

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2256

To be argued by
JOEL N. ROSENTHAL

United States Court of Appeals B

FOR THE SECOND CIRCUIT

Docket No. 74-2256 P/S

UNITED STATES OF AMERICA,

Appellee,

—v.—

HENRY J. JEFFREY,

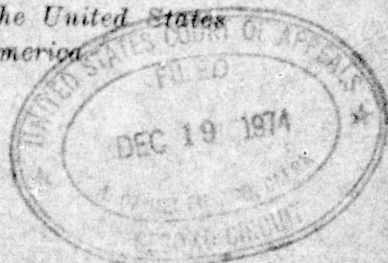
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Attorney for the
Southern District of New York,
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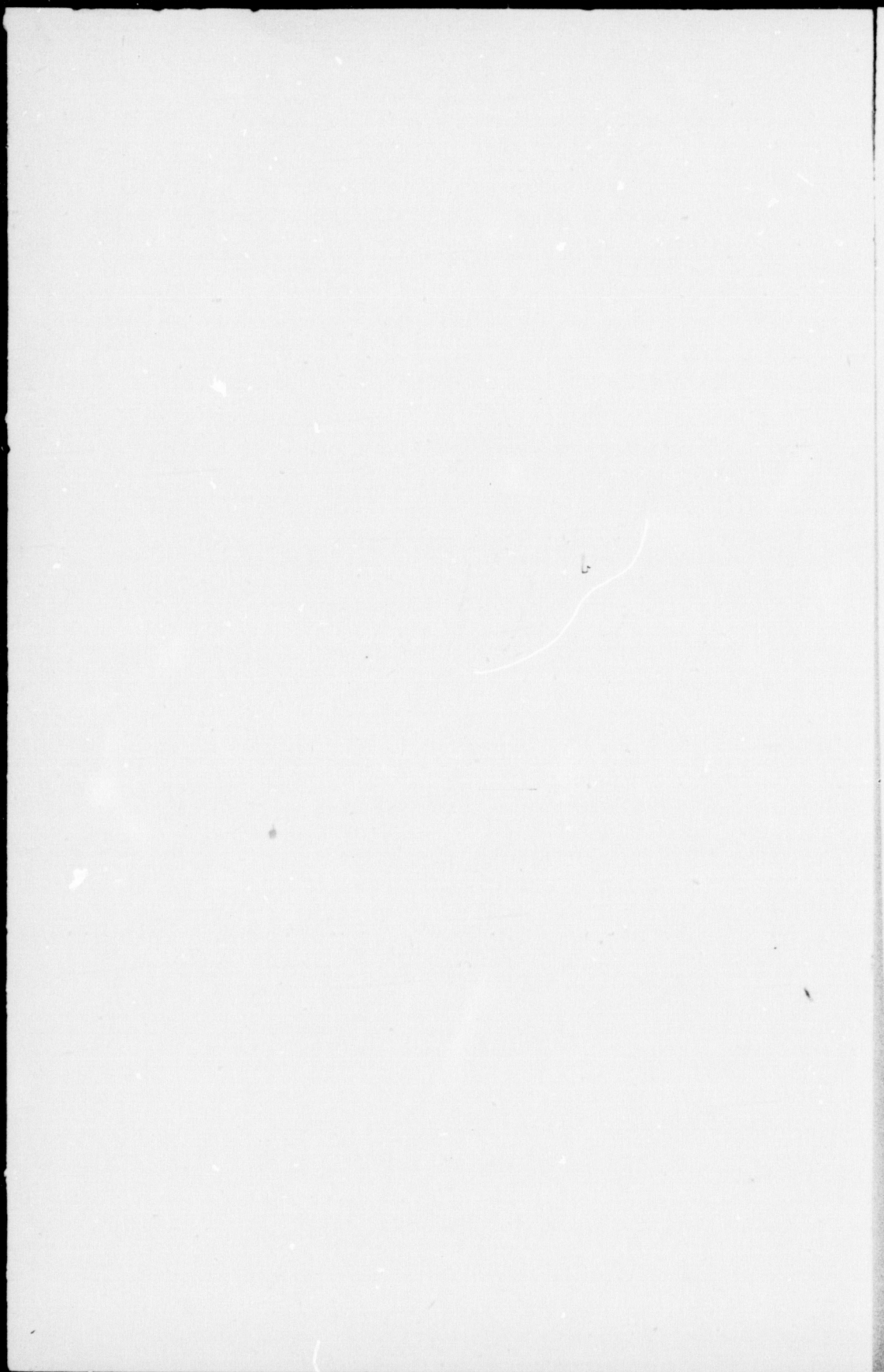
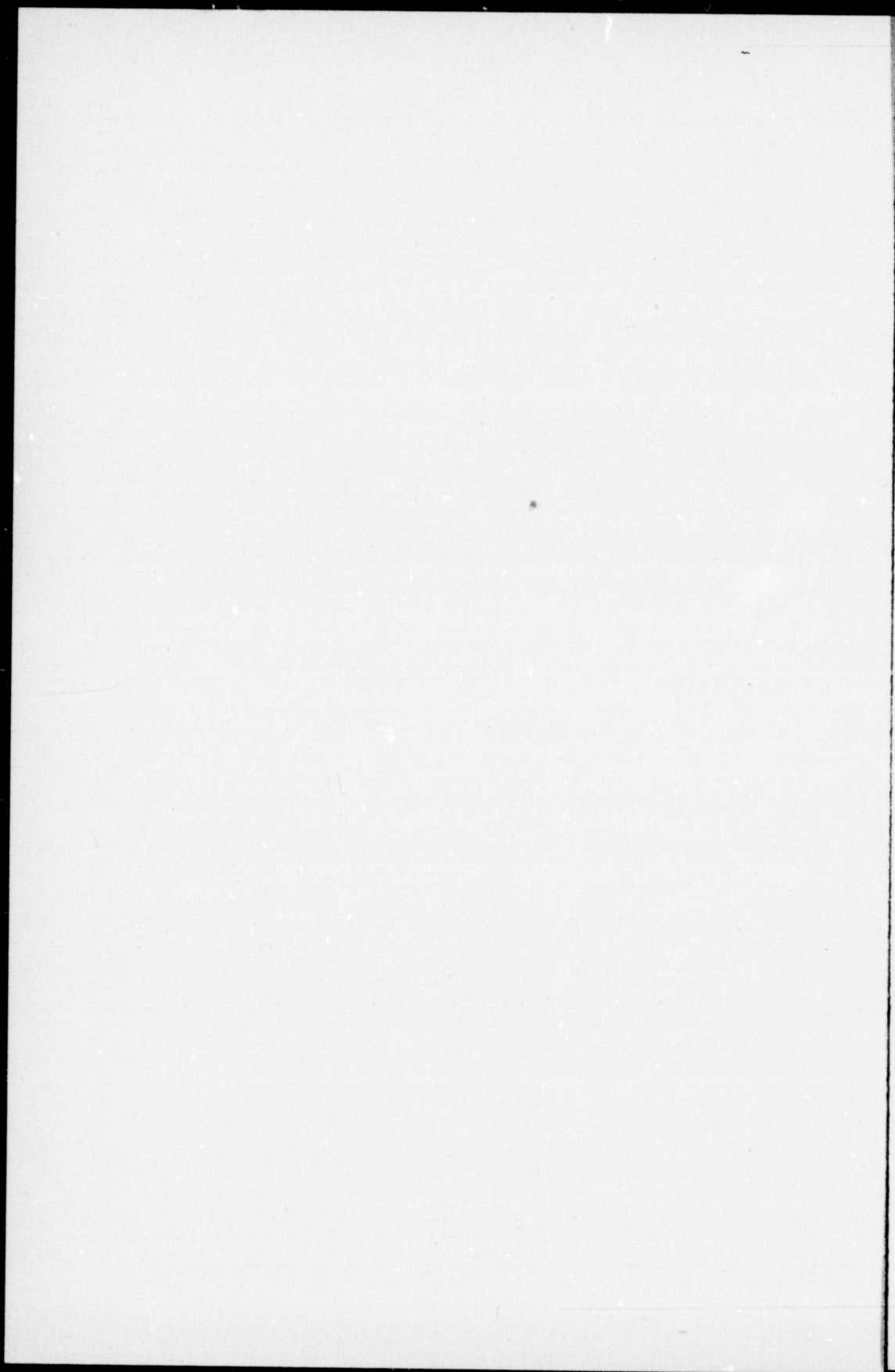


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
The District Court properly denied Jeffrey's motion to dismiss the indictment	5
CONCLUSION	8

TABLE OF CASES

<i>United States v. McDonough</i> , Dkt. No. 74-1530 (2d Cir., October 3, 1974), Slip Op. 5615	5
<i>United States v. Valot</i> , 481 F.2d 22 (2d Cir. 1973)	4, 5, 6



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Appellee,

—v.—

HENRY J. JEFFREY,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Henry J. Jeffrey appeals from a judgment of conviction entered on September 12, 1974 in the United States District Court for the Southern District of New York after a trial on stipulated facts before the Honorable Lee P. Gagliardi, United States District Judge.

Indictment 73 Cr. 505, filed on May 29, 1973, charged Jeffrey and Walter Scott in Count One with conspiracy to defraud the United States by embezzling articles of mail entrusted to an employee of the United States Postal Service in violation of Title 18, United States Code, Section 371. Counts Two and Three charged both defendants with mail embezzlement in violation of Title 18, United States Code, Sections 1709 and 2.

On January 17, 1974, the District Court dismissed the indictment against Scott because the Government had failed to file a timely notice of readiness.

Following Jeffrey's trial on stipulated facts, Judge Gagliardi found him guilty on all counts. On September 12, 1974 the District Court suspended the imposition of sentence, placed Jeffrey on probation for three years on each count, to run concurrently, and fined him \$2,100, to be paid during the term of probation.

Statement of Facts

On January 19, 1972 and on February 12, 1973 Jeffrey, a postal employee, and Walter Scott embezzled two parcels entrusted to Jeffrey containing approximately \$26,000 worth of jewelry from the mails at the Rockefeller Center post office in Manhattan. For his part in the thefts, Jeffrey received \$2,100 from Scott, who presumably pocketed whatever else he was able to realize from the sale of the stolen jewelry.

On March 13, 1973 Jeffrey was questioned by a postal inspector about the thefts and signed a full confession admitting his role in the crimes and implicating Scott. Both Jeffrey and Scott were arrested and arraigned on a complaint that same day. The magistrate appointed separate counsel to represent each defendant and released both defendants on bail.

Thereafter, Jeffrey's attorney Thomas J. Concannon, Esq. and the Assistant United States Attorney then in charge of the case, had discussions regarding Jeffrey's possible cooperation with the Government. It was assumed by both sides that if Jeffrey cooperated and testified for the

Government at Scott's trial, he would be permitted to plead guilty to only one of the three counts in the indictment.

On May 1, 1973 Jeffrey voluntarily appeared before the grand jury, and testified fully concerning his involvement and that of Scott in the embezzlements. Prior to his grand jury appearance Jeffrey had again been interviewed and prepared for his testimony before the grand jury (Transcript, June 14, 1974 at 3).

The three count indictment naming Scott and Jeffrey as defendants was returned by the grand jury on May 29, 1973. On June 11, 1973 Jeffrey and Scott were arraigned on the indictment before Judge Palmieri, who was then presiding in Part I. At that time Jeffrey's attorney stated that his client was prepared to plead guilty (Transcript, June 11, 1973 at 2). Scott, however, entered a plea of not guilty. Under Rule 7(d) of the Rules for the Administration of the Civil and Criminal Calendars of the Southern District of New York under the Individual Assignment System, if any defendant named in a multiple defendant indictment enters a not guilty plea, the entire case must be assigned to a judge by lot, including the plea and sentence of any defendant who offers to plead guilty. The instant case accordingly was assigned by lot to Judge Gagliardi and a not guilty plea was entered for Jeffrey, it being understood by all that he would thereafter enter a guilty plea before Judge Gagliardi, who also would sentence him.

The Government filed its notice of readiness for trial on September 24, 1973, six months and eleven days after Jeffrey's arrest.

On November 20, 1973 Judge Gagliardi notified counsel that the trial was scheduled for December 6, 1973. Shortly thereafter, counsel for Scott and Jeffrey each separately

moved for dismissal of the indictment based upon the government's failure to file a notice of readiness within six months of the date of the defendants' arrests. Nevertheless, Jeffrey voluntarily appeared at the United States Attorney's Office during the week before the trial was to begin in preparation for his testimony as a Government witness at Scott's trial. The trial, however, was subsequently adjourned. Thereafter, on January 17, 1974, Judge Gagliardi dismissed the indictment as to Scott, holding that the Government's failure to file its notice of readiness within six months from the date of Scott's arrest was not the result of excusable neglect, or any other applicable tolling provision of the rules.

Following a hearing on June 12, 1974, the District Court filed a memorandum decision on June 21, 1974 denying Jeffrey's motion to dismiss the indictment (App. Ex. "D"). The District Court concluded that the delay in filing the notice of readiness for trial with respect to Jeffrey was occasioned by exceptional circumstances under Rule 5(h) because the period of Jeffrey's cooperation was excludable under the rule announced by this Court in *United States v. Valot*, 481 F.2d 22 (2d Cir. 1973). Judge Gagliardi specifically held that since it was *undisputed* that Jeffrey was in fact cooperating with the Government from the date of his arraignment on the complaint on March 13, 1973 until at least the time of his arraignment on the indictment on June 11, 1973, this period of nearly two months was excluded from the six month period within which the Government must communicate its readiness for trial. Accordingly, the District Judge ruled that the six month period in this case commenced no earlier than

June 11, 1973 and that therefore the notice of readiness filed on September 24, 1973 was timely.*

On July 24, 1974, after a trial on stipulated facts, Jeffrey was found guilty on all counts.

ARGUMENT

The District Court properly denied Jeffrey's motion to dismiss the indictment.

The sole issue on this appeal is whether Judge Gagliardi properly applied the rule announced in *United States v. Valot*, 481 F.2d 22 (2d Cir. 1973)—which this Court recently reaffirmed in *United States v. McDonough*, Dkt. No. 74-1530 (2d Cir., October 3, 1974), Slip. Op. 5615 at 5617—in excluding the period when Jeffrey was cooperating with the Government from the six month period within which the Government was required to file its notice of readiness for trial. Appellant completely fails in his attempt to distinguish *Valot*, which plainly controls this case and supports the correctness of the District Court's ruling.

* Appellant's brief appears to suggest that the District Court ruled that the Government was guilty of inexcusable neglect in the filing of the notice of readiness as to Jeffrey. It is clear, however, that the selected portions of Judge Gagliardi's opinion quoted by appellant (Br. at 5) refer to Scott and not to Jeffrey as to whom there was no finding of neglect. The pertinent portion of the opinion is as follows:

" . . . In late June of 1973, the government in effect lost track of this case and neglected to file its notice of readiness until September 24, 1973, eleven days after the six month period had run. Because this court found that the neglect to file was inexcusable and that there were no circumstances present in Scott's case to toll the running of the six month period, the indictment was dismissed as to him. *United States v. Scott, supra*.

Jeffrey is in a different situation, however . . ." (emphasis added). App. Ex. " ".

In *Valot* this Court held that the period when the defendant in that case was cooperating with the Government constituted an excludable period of delay occasioned by exceptional circumstances under Rule 5(h) of the Rules Regarding the Prompt Disposition of Criminal Cases. Judge Moore, writing for a unanimous Court, explained the rationale for this rule as follows:

"This period of time must be excluded from the computation of the six month period specified in Rule 4. *No interest properly protected by Rule 4 would be served by permitting appellant to invoke that Rule in this case.* In addition, the possibility of the government's accepting a defendant's offer of cooperation must be protected. *This Court will not permit the perversion of the Rules which Valot here attempts.*" (481 F.2d at 25; emphasis added).

This Court in *Valot* did not elevate the word "cooperation" to a word of art, as appellant's brief would suggest. *Valot* draws no distinction between defendants who cooperate by acting in undercover capacities and those who testify before grand juries and at trials, as Jeffrey was expected to do, and, in part, did.

In *Valot*, the Court found Valot never actually did cooperate as he had agreed to do—indeed he did exactly the opposite. The Court found that the Government was led by Valot to believe that he was cooperating and hence it believed that there would never be any need for a trial in his case. The important consideration therefore, in *Valot*, is not what type of cooperation the defendant proffers, but whether he has indicated to the Government, and whether the Government reasonably believes, that there will be no necessity for a trial of the defendant's case because of his cooperation and/or expected guilty plea. That is exactly what happened here: the Assistant United States Attorney then in charge of the case did not file a notice of readiness

for trial in Jeffrey's case because he believed Jeffrey's case was never going to trial.

Jeffrey and his counsel likewise never believed that Jeffrey would cease cooperating or that his case would go to trial, nor did they give the Government any reason to believe that he would stand trial. Here, the trial court specifically found not only that the Government believed Jeffrey was cooperating during the period from March 13, 1973 until June 11, 1973, but also, unlike *Valot*, that Jeffrey actually *did cooperate* with the Government in its efforts to prosecute his co-defendant Scott during that time.

In his further effort to avoid the controlling effect of *Valot*, appellant also erroneously contends that he could not benefit from any further cooperation that he might have offered after his initial statements to the postal inspector and Assistant United States Attorney. Jeffrey's cooperation and testimony were, of course, essential at subsequent times: when he was prepared for his grand jury testimony, during his grand jury appearance, and at Scott's trial. His actual grand jury and expected trial testimony were the most important elements of his expected cooperation. More importantly, Jeffrey was to be permitted to plead to only one count of the indictment primarily in return for this testimony against Scott. Without such testimony, there would have been no case at all against Scott. His actual grand jury and expected trial testimony were the essential elements of his cooperation that were to be called to the attention of the court at his sentence, and Jeffrey's counsel was well aware of this fact.

In sum, the District Court correctly held that *Valot* controls the instant case. To hold otherwise, and require that the Government file a notice of readiness for trial where the defendant actively cooperates in the investigation and prosecution of a criminal case against another, where

every indication is given that such cooperation will continue and where neither side contemplates a trial, would be to reduce the filing of a notice of readiness for trial to a meaningless formality.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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